

01. BOARD OF PERSONNEL APPEALS

01.1: Jurisdiction [See also 01.32 and 33.1]

See **ULP #12-75** and 1976 District Court decision in **UD #22-75** for discussion of jurisdiction of jurisdiction questions related to the transition from the Professional Negotiations Act for Teachers (repealed July 1, 1975) to the Public Employees Collective Bargaining Act.

The Collective Bargaining for Public Employees Act provides no remedy for a union breaching a duty it owed to a member “by its failure to fairly represent a grievance. Section **39-3-402, MCA** does not encompass this situation.” The Montana Supreme Court held that the District Court (as opposed to the federal court) had jurisdiction. *Ford v. University of Montana* (1979)

Montana Supreme Court Justices “still recognize the holding in *Ford* that a District Court has original jurisdiction to hear claims that a union has breached its duty of fair representation. [They] no longer recognize, however, the dicta in *Ford* which states that a breach of the duty of fair representation is not an unfair labor practice within the meaning of Section **39-31-401, MCA**. Further, [they] no longer recognize other dicta in *Ford* which states that finding jurisdiction in the Board of Personnel Appeals on these matters would necessarily deprive the District Court of jurisdiction.... [They] therefore [held] that the Board of Personnel Appeals has jurisdiction to hear claims that a union has breached its duty of fair representation.” **ULP #24-77 Montana Supreme Court (1981)**

Judge Clark challenged the Board of Personnel Appeals’ jurisdiction over himself as “an unconstitutional infringement by the Legislative Branch over the Judicial Branch and ... a violation of the separation of powers.” The Board concluded that it “has the requisite jurisdiction to act in this matter.” **ULP #11-78**

The Billings School Bus Drivers Association, employees of KAL Leasing, Inc., are not public employees, consequently the Board of Personnel Appeals does not have jurisdiction. **UD #18-78**

“Because employee rights under Section **39-31-201** have been violated, this matter is no longer solely one of breach of contract or one for internal review within a union.... The Board of Personnel Appeals has initial jurisdiction in unfair labor practice matters, and it cannot ignore or delegate that jurisdiction.” **ULP #2-79**

“[B]ecause an employee may have recourse to a district court as a possible choice of forum to file his claim (possibly a declaratory judgment action) does not foreclose him from filing an unfair labor practice charge with the Board if he can assert a statutory violation under Section **39-31-401 MCA**.” **ULP #3-79 District Court (1981)**

“[T]his Board has the jurisdiction to interpret and enforce a contract when that contract is the center of the unfair labor practice charge.” **ULP #7-80**

“The [Board’s] authority to remediate unfair labor practices’... shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement...’.” **ULP #34-80**

See also **ULPs #50-79 and #3-82.**

“The Board of Personnel Appeals has jurisdiction in this matter under Section **39-31-101 et seq., MCA.**” **ULP #32-86.** See also **ULP #1-87** and **UDs #5-89, #7-89, and #16-89.**

“The Board of Personnel Appeals has jurisdiction in this matter under Section **39-31-405 et seq., MCA.**” **ULP #14-87.** See also **ULPs #17-87, #24-87, #34-87, #12-88, #19-88, #27-88, #4-89, #14-89, #62-89, #64-89, #67-89, #31-90, and #08-92.**

“The State of Montana and the Board of Personnel Appeals have jurisdiction over this complaint under the provisions of **39-31-401 et seq.**” **ULP #54-89.**

“This hearing was conducted under authority of Section **39-31-406 MCA** and in accordance with the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.” **ULP #13-90.**

“In situations where a contract provision is asserted as a defense to an unfair labor practice charge, the Supreme Court has recognized the National Labor Relations Board has jurisdiction over the dispute to the extent necessary to resolve the unfair labor practice charge. *J.I. Case v. NLRB*, 321 US 332, 340, 14 LRRM 501 (1944).” **ULP #12-89.**

“[T]he Courts have recognized the concept of dual jurisdiction between the arbitrator and the NLRB, *NLRB v. Huttig Sash and Door Co.*, 377 F.2d 964, relying upon *NLRB v. C & C Plywood*, 87 S.Ct. 559, 64 LRRM 2065 (1967).” **ULP #14-89.**

“Absent agreement between the parties as to the composition of a bargaining unit the Board of Personnel Appeals has exclusive jurisdiction to determine the confidential status of employees within a bargaining unit as well as the composition of a bargaining unit under the authority of **39-31-202 MCA** and **ARM 24.26.610** through **ARM 24.26.622** as well as **ARM 24.26.630.**” **ULP #54-89.**

“The Board of Personnel Appeals has jurisdiction in this matter pursuant to Section **39-31-202 MCA**.” **UD #23-90**. See also **UCs #9-88, #4-90, #3-91, and #21-92**.

“[T]he Board of Personnel Appeals does not have jurisdiction to hear a complaint alleging a violation of a person’s constitutional right to free speech. Such a charge alleges a cause of action cognizable in the state and federal district courts under appropriate circumstances.” **ULP #33-84**.

01.13: Jurisdiction – Conflict with NLRB Jurisdiction

A unit determination petition was dismissed because the “the NLRB agreed to take jurisdiction and conduct an election for certain employees at Opportunities, Inc., in Great Falls, Montana.” **UD #1-81**

“The identity of the employer was not litigated in the NLRB proceeding and the Board of Personnel Appeals is not estopped from determining the identity of the employer in this proceeding... Because the Great Falls Transportation District is an employer within the meaning of **39-13-103 MCA** this Board will exert jurisdiction.” **UD #6-84**

01.131: Jurisdiction – Conflict with NLRB Jurisdiction – Deferral by NLRB

The Board of Personnel Appeals “does not find that the School District has any control over the labor relations and daily operations of the Employer [B.W. Jones and Sons, Inc., providers of school bus drivers for the Billings School District] other than minimal, necessary controls...[W]e have a situation where the National Labor Relations Board has refused jurisdiction, and where this Board is unable to establish jurisdiction... Unfortunately, there are no statutes in Montana for control of collective bargaining in the private sector.” **ULP #29-76**

“The NLRB has consistently refused to exert jurisdiction over bus companies whose major function is the transportation of students to schools.” **UD #18-78**

01.21: Authority and Duty of State Board – Authority of Board Personnel

“[T]he question of personal privacy versus the public’s right to know.. is not properly a determination which an agent of the Board should make.” **ULP #30-77**

“Neither the Board of Personnel Appeals’ authority to remedy an unfair labor practice pursuant to **39-31-406** nor a Union’s duty to fairly represent all bargaining unit members in vitiated by [an] alleged breach of contract by a bargaining unit member.” **ULP #16-83**

“The Board of Personnel Appeals does not have the jurisdiction to [rule on] the rights and protections of the United States and Montana Constitutions.” **ULP #54-84**

See also **ULPs #20-78, #5-80, #34-80, and #19-81.**

“Pursuant to Section **39-31-406 MCA** if, upon the preponderance of the testimony taken, the Board is of the opinion that any person named in the charges has engaged in or is engaging in an unfair labor practice, the Board shall state its findings of fact and shall issue and cause to be served upon the person an order requiring him to cease and desist from the unfair labor practice and to take such affirmative action as will effectuate the policies of this Title 39 Chapter 31 MCA. However, if upon the preponderance of the evidence taken the Board of Personnel Appeals is not of the opinion that the person named in the charge has engaged in or is engaging in an unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the complaint.” **ULP #24-87.** See also **ULP #34-87.**

“In summation, public employees have the right to organize and bargain collectively under the Collective Bargaining Act for Public Employees. The Board of Personnel Appeals is charged with protecting the integrity of that Act.” **ULP #54-89.**

01.24: Authority and Duties of State Board – Authority to Fashion Units [See also 33.1.]

“In view of the discretionary provisions that are set forth in sections **39-31-202, MCA**, and **39-31-207, MCA**, the Board of Personnel Appeals may not be required by writ of mandate to conduct an election forthwith, absent a showing of an abuse of discretion by the Board of Personnel Appeals.” **ULP #20-78 Montana Supreme Court (1979)**

“Pursuant to Section **39-31-202 MCA** in order to assure employees the fullest freedom and exercise in the rights guaranteed by the Montana Collective Bargaining for Public Employees Act, the Board of Personnel Appeals or an agent of the Board shall decide the unit appropriate for the purpose of collective bargaining....” **UD #5-89.** See also **UDs #7-89 and #16-89 and UC #5-88.**

“I can find no prohibition against the Board determining an appropriate unit more than once.” **UC #2-88.**

01.25: Authority and Duties of State Board – Determination of Arbitrability

“It is not within the jurisdiction of the Board to decide whether grievances are suitable for submission to contractual grievance procedures. Nor is it the right of management or labor to resolve disputes of the contract by ignoring them.

The only party which can initiate or withdraw a grievance is the aggrieved party, if the grievance procedure is to be utilized at all.” **ULP #13-74**

“Because of the Teamster’s breach of the duty of fair representation, the grievance was not processed when the contract contained a binding arbitration clause. Thus, the arbitration forum, one uniquely designed to make the determination, was lost. **ULP #24-77**

“It is not within the jurisdiction of the Board to decide whether grievances are suitable for submission to contractual procedures...[or] to rule on the merits of the grievance.... This board need only decide that the parties agreed to arbitrate the matter in dispute.... [It is] then obligated to order the grievance processed and sent to arbitration, if necessary.” **ULP #7-80**

“The Board of Personnel Appeals does have [the] authority to implement the *Collyer* deferral policy.” **ULP #43-81**

See also **ULPs #13-78, #19-79, #5-80, and #22-81.**

“Likewise, procedural arbitrability questions are best resolved using the negotiated dispute resolution machinery. See ***Local 4-447 v. Chevron Chemical Company*, 125 LRRM 2232, 815 F.2d 338, 1947 CA 5.**” **ULP #19-88.** See also **ULP #4-89.**

01.27: Authority and Duties of State Board – Interpretation of Agreements

“The grievance, which was not clearly frivolous, would have been found to be meritorious had it been fully and fairly processed.” **ULP #24-77**

The Board would “not determine whether a contract clause was violated [because the Employer made public comments about specific grievances]....[The question] should be processed under a grievance procedure.” **ULP #30-77**

“[T]here exists clear precedent that the presence of a problem of contractual interpretation would not, in itself, deprive the Board [of Personnel Appeals] of jurisdiction in such cases.” **ULP #29-79**

“[T]he Board does have jurisdiction to hear and determine if Defendant violated the Collective Bargaining Act Title 39 Chapter 31, MCA. Additionally, where the contract language is unambiguous the National Labor Relations Board has held the special competence of an arbitrator is not needed to interpret the contract, ***Oak Cliff-Golman Baking Co.*, 202 NLRB 614, 82 LRRM 1688 (1973).**” **ULP #1-91.**

01.28: Authority and Duties of State Board – Limitations on Board Authority

The Board of Personnel Appeals cannot rule on the *merits* of a grievance in question.

A collective bargaining agreement can “be enforced through civil action in a court of law.” The Board of Personnel Appeals will not attempt to enforce arbitration awards. **ULP #39-80**

“No investigation of the unfair labor practice charges is necessary because the charges fail to allege facts which constitute a violation of the [Public Employees Collective Bargaining] Act. Without an alleged violation of the Act, [the] Board does not have jurisdiction.” **ULP #16-83**

See also **ULP #18-78**.

“As a general rule, the parties are encouraged and expected to exhaust their negotiated dispute resolution process prior to seeking relief elsewhere.” **ULP #19-88**.

“It is well settled that administrative agencies cannot rule on constitutional questions. Hand in hand with this, it is not for an administrative agency to declare that a Court has exceeded its authority. Agencies can interpret laws — especially laws that are within their field of expertise.” **ULP #54-89**.

“[A] matter currently being negotiated cannot be set by judicial action of this Hearing Officer.” **ULP #1-91**.

01.29: Authority and Duties of State Board – Remedial Powers [See also 35.8 and 74.12]

“The Board of Personnel Appeals is not a proper forum to bring a breach of contract action if grounds for such an action would probably lie outside the remedies within the jurisdiction of this Board” DV #8-77

See also **ULPS #19-77, #24-77 Montana Supreme Court (1981) #20-78, #11-79, and #19-79**.

“A remedy of affirmative action cannot be fashioned on the basis of an assumption as to what may have occurred absent the Defendants failure to bargain in good faith, **Gulf States Manufacturing, Inc. v. NLRB**, 114 LRRM, 217 F.2d 1020, CA 5 (1983).” **ULP #34-87**.

01.31: Authority and Duties of Board of Personnel Appeals – Rulings

Section **2-3-501, MCA**, is derived from Section 8 of the Revised Model State Act. That section provides “an individual a way [through declaratory rulings] to determine whether or not the activity he contemplates is in violation of a statute or of this agency’s rule.” **DR #1-79**

“Petitioner is attempting through the declaratory ruling petition to have input and control over this Board’s discretion whether or not it will serve the employer petition.” This is not a proper use of declaratory rulings. **DR #1-79**

See **DRs #1-76, 2-76, 1-77, 2-77, 1-80**

01.32: Authority and Duties of State Board – Statutory Authority

“Violation of either [Section **39-31-401 MCA** or **39-31-402 MCA**] is subject to the jurisdiction of the Board [of Personnel Appeals].” **ULP #11-79**

See also **ULPs #11-78, #3-79, and #50-79** and **ULP #3-79 District Court (1981)**.